***United States Court of Appeals***

***for the***

***District of Columbia Circuit***


# TRANSCRIPT OF RECORD

BRIEF FOR APPELLANTS AND APPENDIX

IN THE

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

491

No. 21,990

FELICIA PAGE DAVIS
and
GLENN W. DAVIS,
*Appellants,*

v.

PHYLLIS O. HARROD
and
DENNETTE HARROD,
*Appellees,*

Appeal from the United States District Court for the District of Columbia



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2026 Eye Street, N.W.
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*Attorneys for Appellants.*

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## BRIEF FOR APPELLANTS

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# INDEX


| | Page |
|---|---|
| STATEMENT OF ISSUES | 1* |
| JURISDICTIONAL STATEMENT | 1 |
| STATEMENT OF THE CASE | 1 |
| STATUTES, REGULATIONS AND RULES INVOLVED | 2 |
| STATEMENT OF POINTS | 2 |
| SUMMARY OF ARGUMENT | 3 |
| ARGUMENT: | |
| The Legislative history of the District of Columbia Employee Non-Liability Act demonstrates that the Act was not intended to extinguish Appellants' right to sue Appellee, her fellow employee or her husband as owner of the motor vehicle in question | 3 |
| CONCLUSION | 6 |


## TABLE OF AUTHORITIES


| | |
|---|---|
| Weaver v. Irani, 22 A.2d 847, District of Columbia Court of Appeals, (1966) | 6 |
| *Title 1, D. C. Code, 921 (1967 ed.) | 1, 2 |
| *Title 40, D. C. Code, 424 | 4 |
| Title 5, U. S. Code, 751 et seq. | 3 |
| Title 5, U. S. Code, 776-777 | 3 |
| Title 5, U. S. Code, 794 | 3 |
| Title 28, U. S. Code, Sec. 2679 | 3, 4 |


*No prior proceedings were involved in this case except Motion and Cross-Motion for Summary Reversal and Affirmance filed in this Court.

## STATEMENT OF ISSUES

Does the District of Columbia Non-Liability Act (Title 1, D.C. Code Sec. 921, *et seq.*) bar an employee of the District of Columbia who is a passenger in an automobile, from bringing a tort suit against a fellow employee and her husband, as operator and owner of the automobile, for damages sustained arising from the negligent operation thereof by the fellow employee, assuming arguendo, that the employee-passenger and employee-operator, were acting within the scope of their employment?

## JURISDICTIONAL STATEMENT

This is an appeal from an Order of the United States District Court for the District of Columbia, on April 10, 1968 (per Curran, C.J.) insofar as it dismissed with prejudice the Complaint of the Appellants Felicia Page Davis and Glenn W. Davis (Plaintiffs below) against the Appellees, (Defendants below) based upon consideration of Defendants' Motion for Summary Judgment, Plaintiffs' Opposition thereto, and oral argument in open Court. The jurisdiction of this Court to review the judgment below upon appeal is based upon Section 1291 of Title 28, United States Code.

## STATEMENT OF THE CASE

The Appellant Felicia Page Davis brought suit against Defendants Phyllis O. Harrod and Dennette Harrod, her husband, for injuries received in a motor vehicle accident which occurred on February 25th, 1965. Mrs. Davis was a passenger in the automobile which was owned by Defendant Dennette Harrod and operated by Mrs. Harrod. Mrs.

Davis and Mrs. Harrod had completed their school day at a public school in the District of Columbia in which they were both employed. While driving to a meeting of high school counselors at Spingarn High School that same afternoon, Mrs. Harrod negligently drove the vehicle into a light pole. As a direct and proximate result thereof Mrs. Davis sustained severe and permanent personal injuries.

## STATUTE INVOLVED

This case turns on the single question of whether the District of Columbia Employee Non-Liability Act bars Appellants' suit against her fellow employee (Appellee) and her husband (Appellee).

The District of Columbia Employee Non-Liability Act, Act of Congress approved July 14, 1960, 75 Stat. 519, Sections 1-921 - 1-926, D.C. Code, 1967 Ed., provides in pertinent part as follows:

> Section 1-925, states: "After the effective date of sections 1-921 to 1-926, no civil action or proceeding shall be brought or be maintained against an employee of the District for loss of or damage to property or for personal injury, including death, resulting from the operation by such employee of any vehicle if it be alleged in the complaint or develop in a later stage of the proceedings that the employee was acting within the scope of his office or employment, unless the District shall, in an action brought against it for such damage or injury, including death, specifically deny liability on the ground that the employee was not, at the time and place alleged, acting within the scope of his office or employment . . ."

## STATEMENT OF POINTS

The sole issue in this appeal is the question of whether Appellants' tort claim is extinguished by the District of Columbia Employee Non-Liability Act as a right of action against Mrs. Harrod, a fellow employee (Appellee), and her husband Dennette Harrod, owner of the vehicle involved (Appellee).

## SUMMARY OF ARGUMENT

The Legislative history of the District of Columbia Employee Non-Liability Act demonstrates that the Act was not intended to extinguish Appellants' right to sue Appellee, her fellow employee or her husband as owner of the motor vehicle in question.

## ARGUMENT

At the outset, there is no question that both Mrs. Davis and Mrs. Harrod, Appellant and Appellee, obtained benefits under the provisions of the Federal Employees' Compensation Act (5 U.S.C. 751, *et seq.*) which Act applies to employees of the District of Columbia, by virtue of the act of Congress (5 U.S.C. 794). Section 7(b) of that Act designates its benefits as the "exclusive" liability of the United States and its instrumentalities. Therefore, Mrs. Davis and Mrs. Harrod were entitled to the benefits conferred by the Federal Employees' Compensation Act. Because of the exclusiveness provision, it logically follows that Mrs. Davis and Mrs. Harrod *may not* sue the Government of the District of Columbia in tort. It can be asserted, in effect, that the United States has become the employer for compensation purposes, by virtue of the substitution effected by the Act.

Under the subrogation provisions of the Federal Employees' Compensation Act (Sec. 26 and 27, 5 U.S.C. 776-777), Mrs. Harrod would be considered a "third party". As such, under applicable common law theories of negligence, it is clear that Mrs. Davis could sue Mrs. Harrod and it follows that she certainly could sue Mrs. Harrod's husband as the owner of the motor vehicle.

In Appellees' opposition to Appellants' Motion for Summary Reversal counsel for Appellee took great pains to attempt to negate the assertion that Mrs. Harrod would be considered "a third party". In support thereof he cites Title 28, Section 2679, U.S. Code, which

provides generally for the insulation of a federal employee from personal liability for another's injuries arising out of the federal employee's employment by the United States and while driving his own automobile in the course of his employment with the United States, and generally, that the remedy of any person injured as a result of the operation of a motor vehicle by a government employee acting within the scope of his employment is exclusively against the United States and not against the employee whether the vehicle was owned by the United States or by the employee.

It is clear that Title 28, Section 2679, U.S. Code, applies to the United States and not to the District of Columbia or its employees. Although as Appellants' counsel states there is a striking similarity between the provisions of the Federal statute and the D.C. statute, there is no separate D.C. statute specifically setting this forth as is the case with Federal Employees' of the United States Government under Title 28, 2679, U.S. Code.

By virtue of the District of Columbia Employees Non-Liability Act, (the District) has foregone the defense of governmental immunity in a negligence action *against it* arising out of the negligence or wrongful act or omission of any employee of the District occurring as the result of operation by such employee, within the scope of his office or employment of a vehicle owned or controlled by the District. In essence the statute operates to substitute Defendants. The Appellee, Mrs. Harrod as a District employee involved can claim immunity from Mrs. Davis' suit only where the Appellant Mrs. Davis as the injured party has a cause of action against the District of Columbia. This she does not have because of the exclusiveness of the remedy provided by the Federal Employees' Compensation Act. Thus Mrs. Davis is perfectly proper in pursuing her common law negligence suit against Mrs. Harrod. It also follows that Mr. Harrod as owner of the vehicle would likewise be amenable to suit under Title 40 Section 424 of the D.C. Code (implied consent statute).

In looking at the legislative history of the Act, the Senate District Committee made reference to the following language favorably reporting the Statute, saying in pertinent part "the purpose of this bill is to deny to the District of Columbia, in suits or claims arising out of the negligent operation of a vehicle owned and controlled by it and operated by its employees in the performance of their official duties, the defense of governmental immunity, and to relieve such employees of liability *in such cases*." (emphasis added). Congress cannot be said to have intended to deprive individuals of causes of action by passage of this Act. The Congressional intent was that the Statute apply when, *and only when*, an injured party has a cause of action against the District of Columbia. In a letter from the Board of Commissioners of the District of Columbia, dated May 24, 1960, transmitting the proposed statute to the Chairman of the Senate Committee, the Commissioners recognized that there were basically three conflicting interests involved as follows: (1) the interest of the employee who allegedly has negligently operated a motor vehicle, (2) the interest of a person who has been injured or has suffered loss as the result of the alleged and negligent operation of the motor vehicle; and (3) the interest of the Government of the District of Columbia which is engaged in carrying on a wide variety of activities, all of which must be carried on as efficiently and inexpensively as possible if the general public is to be well served. "To protect the employee, suit against the employee should be banned, *leaving the District the sole entity against which recovery should be sought*" (emphasis supplied).

The Commissioner's letter which was adopted by the Senate Report shows the intention that protection due the employee be rendered only when the District can be sued. This is the only explanation which justified the language "—leaving the District the sole entity against which recovery should be sought". Since Mrs. Davis cannot sue the District, obviously then it is not left to be sued.

The Statute does not contemplate the factual situation in this case. It is clear that the interests of the injured party would not be served if she is deprived of a negligence suit, nor would the interest of the District of Columbia be adversely affected, otherwise.

The statutory language itself is clear and convincing evidence that it would not apply to Mrs. Davis' suit herein. Quoted above and repeated here in pertinent part, the statute says "unless the District shall in an action brought against it for such damage or injury, including death, specifically deny liability on the ground that the employee was not, at the time and place alleged, acting within the scope of her or his office or employment. . . ." From this language it is apparent that the Statute requires that before a District employee can be sued, the injured party must first sue the District. If the District then asserts as a defense, the fact that the employee was not acting within the scope of his employment, the injured party may then sue the employee. It is useless and absurd for Mrs. Davis to file suit against the District because she has no cause of action against it, as has been previously set forth, due to the exclusiveness of the Federal Employees' Compensation Act remedy. The statutory implementation of the Congressional intent as set forth by the Commissioners of the District of Columbia lends positive force and effect to the contention that the Statute was not intended to apply in the instant case.

## CONCLUSION

The Court is compelled to come to the conclusion that Mrs. Davis has a cause of action against the Harrods, which, under the factual situation presented, is not barred by the District of Columbia Employees' Non-Liability Act.

The leading and only case in the area to date is *Weaver v. Irani*, decided by the District of Columbia Court of Appeals on October 3, 1966, 222 A 2d. 847. In that case, the facts do not show a claim by the

Plaintiff for compensation under the Federal Employees' Compensation Act which is the exclusive remedy to which the District of Columbia employee is entitled. A second distinction is the fact that the employees in the Weaver case were actually working in the automobile; Mr. Weaver was actually operating a walkie talkie radio in the rear seat. In our case the individuals involved were on the way to a teacher's meeting and were not directly engaged in any governmental activity at the time of the collision complained of.

The Statute in question, which is in derogation of the common law should be strictly construed and should not be used as a vehicle to deprive Mrs. Davis of her action against Mr. and Mrs. Harrod for the severe and permanent personal injuries which she sustained.

Respectfully submitted,

HARRY S. WENDER

JULES FINK

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Washington, D. C.

*Attorneys for Appellants.*

INDEX TO APPENDIX


| | Page |
|---|---|
| DOCKET ENTRIES | 1 |
| COMPLAINT: | |
| Count I | 2 |
| Count II | 4 |
| ANSWER: | |
| First Defense | 4 |
| Second Defense | 5 |
| MOTION OF DEFENDANTS FOR SUMMARY JUDGMENT | 5 |
| STATEMENT OF MATERIAL FACTS WHICH DEFENDANTS CONTEND ARE NOT IN DISPUTE | 7 |
| MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION OF DEFENDANTS FOR SUMMARY JUDGMENT | 8 |
| OPPOSITION OF PLAINTIFF TO MOTION OF DEFENDANTS FOR SUMMARY JUDGMENT | 9 |
| STATEMENT OF MATERIAL FACTS | 10 |
| MEMORANDUM OF POINTS & AUTHORITIES IN OPPOSITION TO THE MOTION OF DEFENDANTS FOR SUMMARY JUDGMENT | 11 |
| ORDER | 16 |
| NOTICE OF APPEAL | 16 |

# APPENDIX

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UNITED STATES DISTRICT COURT
FOR DISTRICT OF COLUMBIA

| | | |
|---|---|---|
| FELICIA PAGE DAVIS<br>GLENN W. DAVIS<br>909 Longfellow Street, N.W.<br>Washington, D. C.,<br>Plaintiffs | : | |
| vs. | : | Civil Action No. 394-'67 |
| PHYLLIS O. HARROD<br>DENNETTE HARROD<br>1621 Varnum Street, N.W.<br>Washington, D. C.,<br>Defendants | : | |

## DOCKET ENTRIES

| Date | Proceedings |
|---|---|
| 1967 | |
| Feb. 20 | Complaint, appearance, Jury Demand filed. |
| Feb. 20 | Summons, copies (2) and copies (2) of complaint issued. Both ser. 2/28/67 |
| Mar. 15 | Answer of defts to complaint; c/m 3/13/67; appearance of Galiher, Stewart & Clarke, Frank J. Martell. filed |
| Mar. 15 | Calendared (AC/N) (N) |
| Mar. 15 | Notice of defts to take deposition of pltf #1; c/m 3/13/67. filed |
| Mar. 15 | Motion of defts to dismiss count two of complaint; P&A; c/m 3/13/67; M.C. filed |
| Mar. 20 | Opposition of pltfs to motion to dismiss; P&A; c/m 3/17/67. filed |
| Apr. 10 | Notice of pltfs to take deposition of deft; c/m 4/7/67. filed |
| May 1 | Order dismissing with prejudice Count II of complaint. (N) Jones, J. |
| May 15 | Deposition of pltf #1; 5/4/67. filed. |

| Date | Proceedings |
|---|---|
| June 22 | Notice of pltfs to take deposition of deft #1; c/m 6/21/67. filed. |
| July 28 | Deposition of Phyllis O. Harrod, July 19, 1967. ($43.75 paid by pltfs). filed |
| Oct. 25 | Called. Pretrial Examiner |
| 1968 | |
| Jan. 26 | Motion of defts for summary judgment; notice; statement; P&A; c/m 1/26/68; M.C. filed |
| Feb. 20 | Opposition of pltffs to motion for summary judgment; statement; P&A; c/m 2/19/68. filed. |
| Mar. 25 | First Notice under Rule 13 |
| Mar. 27 | Certificate of Readiness by pltffs; c/m 3/26/68. filed |
| Apr. 10 | Order granting deft's motion for summary judgment; entering judgment for defts. (N) AC/N. Curran, C.J. |
| May 3 | Notice of appeal by plaintiffs; copy mailed to Frank J. Martell. Deposit $5.00 by Fink. filed. |

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## COMPLAINT

### Count I

(Negligence - permanent injuries sustained in automobile collision - loss of consortium)

1. The amount in controversy exceeds the sum of Ten Thousand ($10,000.00) Dollars exclusive of interest and court costs.

2. The plaintiffs, Felicia Page Davis and Glenn W. Davis, and the defendants, Phyllis O. Harrod and Dennette Harrod, are residents of the District of Columbia.

3. On Thursday, February 25, 1965 at approximately 3:05 P.M., Mrs. Davis who was then unmarried (and known as Felicia Page), was a passenger in a 1964 Oldsmobile sedan owned by Mr. Harrod and operated by his wife, Phyllis G. Harrod. The Harrod vehicle was traveling east on Michigan Avenue, N.W., in the District of Columbia.

As the vehicle was approaching the exit from Park Place onto Michigan Avenue a truck was entering Michigan Avenue from this exit at a high rate of speed. Mrs. Harrod was involved in lighting a cigarette with car lighter and not looking toward her left where the truck was blending into Michigan Avenue. Mrs. Davis called Mrs. Harrod's attention to the truck in sufficient time for her to avoid any collision therewith. Despite the warning, Mrs. Harrod failed to take appropriate action to avoid the ensuing collision.

4. The collision, as aforesaid, was due to the primary or contributory negligence of this defendant in failing to take proper precautions to avoid the collision and in violating applicable motor vehicle regulations then in effect in the District of Columbia.

5. As a direct and proximate result of the defendant's negligence as aforesaid, Mrs. Davis suffered and continues to suffer severe and permanent injuries, great pain of body and mind, loss of earnings, medical, dental and other expenses, and loss of consortium, conjugal fellowship and services. She sustained a fracture of the distal pole of the left patella with an associated avulsion of the patellar ligament in addition to a contusion on the medial aspect of the upper third of her leg. Her injuries necessitated hospitalization for eleven days, approximately twelve weeks of home convalescence and extensive outpatient treatment thereafter, including the removal of a cast, wire and transfixing pin from her leg. She continues to have limitation of full motions of the knee.

WHEREFORE, the premises considered, the plaintiff, Felicia Page Davis, demands judgment against the defendants and each of them in the sum of One Hundred Thousand ($100,000.00) Dollars, plus interest and costs and requests such other and further relief as the Court may deem just and proper.

Count II

(Loss of consortium, conjugal fellowship and services of Mrs. Davis)

6. Plaintiff, Glenn W. Davis, incorporates the allegations of paragraphs 1 through 4 above.

7. Mr. Davis was engaged to be married to plaintiff, Felicia Page, and actually had the marriage license at time of this incident. The marriage was postponed to July, 1965 - near the termination of physical therapy - required as a result of this accident. Mr. Davis has suffered as a result of the delayed marriage and since the marriage he has been deprived of his wife's consortium, conjugal fellowship and services.

WHEREFORE, the premises considered, the plaintiff, Glenn W. Davis, demands judgment against the defendants and each of them in the sum of Eleven Thousand ($11,000.00) Dollars plus interest and costs and requests such other and further relief as the Court may deem just and proper.

Plaintiffs demand a trial by jury as to Counts I and II.

WENDER & FINK

By /s/ Harry S. Wender

By /s/ Jules Fink

Attorneys for Plaintiffs
2026 Eye Street, N. W.
Washington, D. C. 20006
FEderal 7-7700

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[Filed March 15, 1967]

ANSWER

First Defense

The Complaint fails to state a cause of action against these defendants upon which relief can be granted.

Second Defense

Defendants admit their residency in the District of Columbia and that on February 25, 1965, a motor vehicle owned by defendant Dennette Harrod and operated by defendant Phyllis O. Harrod, was involved in an accident at or near the intersection of Michigan Avenue and Park Place, N. W., Washington, D. C., and that at that time, one Felicia Page was a passenger in defendant's vehicle, but defendants deny each and every allegation of carelessness and negligence alleged as to them; have neither knowledge nor information sufficient to form a belief as to any injury or damage as allegedly sustained by plaintiffs herein and therefore deny these allegations; deny each and every other allegation contained in said Complaint not specifically answered herein.

GALIHER, STEWART & CLARKE

By /s/ Frank J. Martell

Attorneys for Defendants
1215 - 19th Street, N. W.
FEderal 7-8330

[Certificate of Service]

[Filed Jan. 26, 1968]

MOTION OF DEFENDANTS FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure and Rule 9(h) of this Court, the defendants Phyllis O. Harrod and Dennette Harrod move the Court for Summary Judgment in their favor upon the ground that the material facts, as to which there is no genuine issue, conclusively demonstrate that the defendants are entitled to judgment in their favor as a matter of law.

Plaintiff Felicia Page Davis, has brought suit against defendants Phyllis O. Harrod and Dennette Harrod for injuries received in a motor vehicle accident which occurred on February 25, 1965. As set forth in the Complaint, Felicia Page Davis was a passenger in a motor vehicle owned by defendant Dennette Harrod and operated by defendant Phyllis

O. Harrod, which vehicle was forced off of the roadway and into a light pole by an unidentified truck at or near the intersection of Michigan Avenue and Park Place, Washington, D. C. At the time of this accident, the plaintiff Felicia Page Davis was a teacher in the District of Columbia public school system, an employee of the District of Columbia Government. The defendant, Phyllis O. Harrod, was likewise a teacher in the District of Columbia public school system, and, likewise, an employee of the District of Columbia Government. Following said accident, both plaintiff Felicia Page Davis and defendant Phyllis O. Harrod, as employees of the District of Columbia Government, received benefits, as well as payment of all hospital and medical bills through the Department of Labor, Bureau of Employees Compensation.

These facts appear in the depositions of plaintiff Felicia Page Davis and defendant Phyllis O. Harrod, which depositions are prayed to be read as a part hereof. All of these facts more fully appear in the statement of material facts, and the memorandum of points and authorities which are filed herewith.

GALIHER, STEWART & CLARKE

By /s/ Frank J. Martell

Attorneys for Defendants

* * *

NOTICE TO: Wender and Fink
Attorneys for Plaintiffs
2026 Eye Street, N. W.
Washington, D. C.

Please take notice that the points to be submitted in support of this Motion, and the authorities intended to be used, are attached hereto. The rules of the above-named Court require that if you oppose the granting of the same, you shall within five days from the date of service of a copy thereof upon you, or such further time as the said Court may grant, or as the parties of this suit may agree upon, file in reply with the Clerk of said Court a statement of the points and authorities upon

which you rely and serve a copy thereof upon counsel for the defendants named herein.

/s/ Frank J. Martell

[Certificate of Service]

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## STATEMENT OF MATERIAL FACTS WHICH DEFENDANTS CONTEND ARE NOT IN DISPUTE

Pursuant to Rule 9(h) of the rules of this Court, defendants Phyllis O. Harrod and Dennette Harrod, state that the following material facts are not in dispute:

1. On February 25, 1965, plaintiff, Felicia Page Davis, was employed by the District of Columbia Board of Education.

2. On February 25, 1965, defendant, Phyllis O. Harrod, was employed by the District of Columbia Board of Education.

3. At the time of the accident on February 25, 1965, Phyllis O. Harrod was operating the motor vehicle owned by the defendant, Dennette Harrod, within the scope of her office or employment for the District of Columbia Government.

4. By reason of the fact that Felicia Page Davis and Phyllis O. Harrod were acting within the scope of their employment at the time of said accident, both Felicia Page Davis and Phyllis O. Harrod were entitled to, and did receive benefits through the Bureau of Employees Compensation, Department of Labor, United States Government.

GALIHER, STEWART & CLARKE

By /s/ Frank J. Martell

Attorneys for Defendants

* * *

[Certificate of Service]

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## MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION OF DEFENDANTS FOR SUMMARY JUDGMENT

The defendants Phyllis O. Harrod and Dennette Harrod are entitled to judgment in their favor as a matter of law. The Act of Congress approved July 14, 1960, 75 Stat. 519, Sections 1-921 - 1-926, D.C. Code, 1967 Ed., known as The District of Columbia Employee Non-Liability Act, relieves all District employees engaged in the performance of their duties from liability for negligence in the operation of motor vehicles. In lieu of a cause of action in such a case as the present one, Congress provided for the substitution of the District of Columbia for its employees and has denied to the District the defense of governmental immunity. Section 1-925, supra, provides:

> "After the effective date of sections 1-921 to 1-925, no civil action or proceeding shall be brought or be maintained against an employee of the District for loss of or damage to property or for personal injury, including death, resulting from the operation by such employee of any vehicle if it be alleged in the complaint or develop in a later stage of the proceeding that the employee was acting within the scope of his office or employment, unless the District shall, in an action brought against it for such damage or injury, including death, specifically deny liability on the ground that the employee was not, at the time and place alleged, acting within the scope of his office or employment . . ."

Based upon the foregoing section of the District of Columbia Employee Non-Liability Act, defendants Phyllis O. Harrod and Dennette Harrod respectfully request the Court to enter Summary judgment in their favor. The attention of the Court is respectfully drawn to the case of Weaver vs. Irani and Milam, 222 A. 2d 846, a case having certain similar significant features to the one presently before this Court. In its decision, our District of Columbia Court of Appeals upheld the ruling of the trial court which had held that an action could not be maintained against a District of Columbia Metropolitan police officer whose negligence while operating his own automobile on assignment as a member of the Canine Corps resulted in injury to a passenger in his vehicle.

GALIHER, STEWART & CLARKE
By /s/ Frank J. Martell
Attorneys for Defendants

* * *

[Certificate of Service]

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[Filed Feb. 20, 1968]

## OPPOSITION OF PLAINTIFF TO MOTION OF DEFENDANTS FOR SUMMARY JUDGMENT

Comes now the Plaintiff through counsel, and opposes the Defendants' Motion for Summary Judgment and as grounds therefor states:

1. There are no genuine issues of material facts as to which there is dispute.

2. The Defendants are not entitled to a judgment in their favor as a matter of law.

3. The statements set forth in Paragraph 2 of Defendants' Motion for Summary Judgment state the basic facts of this case. The complete facts are contained in the depositions of the Plaintiff, Felicia Page Davis and the Defendant, Phyllis O. Harrod, which the Plaintiff requests be read as a part of this opposition.

4. The Plaintiff incorporates by reference herein its statement of material facts and the Memorandum of Points & Authorities in Opposition to the Motion of Defendants' for Summary Judgment which are attached hereto.

WENDER & FINK

By /s/ Jules Fink

Attorney for Plaintiff

* * *

[Certificate of Service]

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STATEMENT OF MATERIAL FACTS

Statement of Material Facts which the Plaintiffs contend are not in dispute are set forth pursuant to Rule 9(h) of the rules of this Court.

1. There is a question as to whether or not the Defendant, Phyllis O. Harrod, was operating the motor vehicle owned by the Defendant, Dennette Harrod, within the scope of her office of employment for the District of Columbia Government, as defined by the District of Columbia Employee Non-Liability Act.

2. Even if it can be said that both Mrs. Harrod and Mrs. Davis were acting within the scope of their employment, the Defendant is not entitled to Summary Judgment for the reasons set forth in the Memorandum of Points & Authorities in Opposition to the Motion of the Defendants for Summary Judgment which is attached hereto and incorporated herein by reference. The Court is asked to read this Memorandum as a part of Plaintiff's opposition.

3. At the time the Defendant, Phyllis O. Harrod, drove her car off the road into a light pole causing Mrs. Davis' serious permanent injuries, Mrs. Harrod and Mrs. Davis were employed as Counselors at Banneker School, a part of the District of Columbia School System. At the end of their school day, they were driving to a meeting at Spingarn High School in the District of Columbia. The meeting was a

combined meeting of counselors in the D. C. School System. Mrs. Harrod had invited Mrs. Davis to drive with her since they were going to the same meeting and lived in the same section of town.

WENDER & FINK

By /s/ Jules Fink

Attorney for the Plaintiff

* * * *

---

## MEMORANDUM OF POINTS & AUTHORITIES IN OPPOSITION TO THE MOTION OF DEFENDANTS FOR SUMMARY JUDGMENT

**ISSUE:**

Does the District of Columbia Employee Non-Liability Act bar an employee of the District of Columbia from bringing a tort suit against a fellow employee for damages sustained arising out of the negligent operation of a motor vehicle by the fellow employee, assuming arguendo, that they were acting within the scope of their employment:

**FACTS:**

Mrs. Davis and Mrs. Harrod were employees of the District of Columbia as Counselors in the D. C. School System. They were riding in an automobile owned by Mrs. Harrod's husband. They had completed their school day at school where both were employed. They were driving to a meeting of high school counselors at Spingarn High School from Banneker School, where they were employed, in the Harrod vehicle. Mrs. Harrod negligently drove the vehicle into a light pole. As a direct and proximate result thereof, Mrs. Davis sustained severe and permanent personal injuries. What are Mrs. Davis' rights in the situation? We must determine who may be sued in tort and against whom she has any <u>other</u> relief.

At the outset it is a fact that both Mrs. Davis and Mrs. Harrod obtained benefits under the provisions of the Federal Employees' Compensation Act (5 U.S.C. 751, <u>et seq.</u>) which act applies to employees of

the District of Columbia. The application of such benefits to employees of the District of Columbia arises by virtue of the act of Congress (5 U.S.C. 794).

Section 7(b) of that Act designates its benefits as the "exclusive" liability of the United States and its instrumentalities. Therefore, Mrs. Davis and Mrs. Harrod were entitled to the benefits conferred by the Federal Employees' Compensation Act. Because of the exclusiveness provision, it logically follows that Mrs. Davis and Mrs. Harrod may not sue the Government of the District of Columbia in tort. It can be asserted, in effect, that the United States has become the employer for compensation purposes, by virtue of the substitution effected by the Act. Under the subrogation provisions of the Federal Employees Compensation Act (Sec. 26 and 27, 5 U.S.C. 776-777), Mrs. Harrod would be considered a "third party". It is clear under applicable common law theories of negligence, that Mrs. Davis could sue Mrs. Harrod.

Does the existence of the District of Columbia Employees Non-Liability Act (Title 1, D.C. Code, Sec. 921, et seq.), 74 Stat. 519, et seq., bar the filing of such suit.

Section 1-925 of that Act provides:

> "After the effective date of sections 1-921 to 1-925, no civil action or proceeding shall be brought or be maintained against an employee of the District for loss of or damage to property or for personal injury, including death, resulting from the operation by such employee of any vehicle if it be alleged in the complaint or develop in a later stage of the proceeding that the employee was acting within the scope of his office or employment, unless the District shall, in an action brought against it for such damage or injury, including death, specifically deny liability on the ground that the employee was not, at the time and place alleged, acting within the scope of his office or employment . . ."

By virtue of this statute, the District of Columbia has foregone the defense of governmental immunity in a negligence action against it arising out of the negligence or wrongful act or omission of any employee of the District occurring as the result of operation by such employee, within the scope of his office or employment of a vehicle owned or controlled by the District. It follows therefore, that the Plaintiff is precluded from suing the individual employee involved unless the District in its answer to the complaint denied liability on the ground that the employee was not, at the time and place alleged, acting within the scope of his employment or office. In essence, then the statute operates to substitute defendants.

The issues set forth above now becomes relevant. Mrs. Davis has filed the suit against Mrs. Harrod and her husband as owner of the vehicle. The Defendants have filed a Motion for Summary Judgment, contending that the Harrods are immune from suit because of the fact that at the time of the occurrence, Mrs. Harrod was acting within the scope of her employment.

The Plaintiff claims that there is no immunity from suit by Mrs. Harrod. In support of this contention, we must examine the Act of Congress carefully and upon doing so, we must come to the inescapable conclusion that the Act was never intended to apply to the peculiar facts of this case.

The District employee involved (Mrs. Harrod) can claim immunity from Mrs. Davis' suit only where Mrs. Davis as the injured party has a cause of action against the District of Columbia. As has been set forth above, Mrs. Davis has no such cause of action because of the exclusiveness of the remedy provided by the Federal Employees' Compensation Act. Thus, Mrs. Davis is perfectly proper in pursuing her common law negligence suit against Mrs. Harrod.

In looking at the legislative history of the Act, the Senate District Committee made reference to the following language favorably reporting the statute, saying in pertinent part "the purpose of this bill is to deny

to the District of Columbia, in suits or claims arising out of the negligent operation of a vehicle owned and controlled by it and operated by its employees in the performance of their official duties, the defense of governmental immunity, and to relieve such employees of liability in such cases" (emphasis added). Congress cannot be said to have intended to deprive individuals of causes of action by passage of this Act. The Congressional intent was that the Statute apply when, and only when, an injured party has a cause of action against the District of Columbia. In a letter from the Board of Commissioners of the District of Columbia, dated May 24, 1960, transmitting the proposed Statute to the Chairman of the Senate Committee, the Commissioners recognized that there were basically three conflicting interests involved as follows: (1) the interest of the employee who allegedly has negligently operated a motor vehicle (2) the interest of a person who has been injured or has suffered loss as the result of the alleged and negligent operation of the motor vehicle; and (3) the interest of the Government of the District of Columbia which is engaged in carrying on a wide variety of activities, all of which must be carried on as efficiently and inexpensively as possible if the general public is to be well served. "To protect the employee, suit against the employee should be banned, leaving the District the sole entity against which recovery should be sought" (emphasis supplied).

The Commissioner's letter which was adopted by the Senate Report shows the intention that protection due the employee be rendered only when the District can be sued. This is the only explanation which justified the language "—leaving the District the sole entity against which recovery should be sought". Since Mrs. Davis cannot sue the District, obviously then it is not left to be sued.

The Statute does not contemplate the factual situation in this case. It is clear that the interests of the injured party would not be served if she is deprived of a negligence suit, nor would the interest of the District of Columbia be adversely affected.

The statutory language itself is clear and convincing evidence that it would not apply to Mrs. Davis' suit herein. Quoted above and repeated here in pertinent part the statute says "unless the District shall in an action brought against it for such damage or injury, including death, specifically deny liability on the ground that the employee was not, at the time and place alleged, acting within the scope of her or his office or employment . . ." From this language it is apparent that the Statute requires that before a District employee can be sued, the injured party must first sue the District. If the District then asserts as a defense, the fact that the employee was not acting within the scope of his employment, the injured party may then sue the employee. It is useless and absurd for Mrs. Davis to file suit against the District because she has no cause of action against it, as has been previously set forth, due to the exclusiveness of the Federal Employees' Compensation Act remedy. The statutory implementation of the Congressional intent as set forth by the Commissioners of the District of Columbia lends positive force and effect to the contention that the Statute was not intended to apply in the instant case.

The Court is compelled to come to the conclusion that Mrs. Davis has a cause of action against the Harrods, which, under the factual situation presented is not barred by the District of Columbia Employees' Non-Liability Act. The Defendant has cited the case of Weaver vs. Irani, decided by the District of Columbia Court of Appeals on October 3, 1966, 222 A 2d, 847. In that case, the facts do not show a claim by the Plaintiff for compensation under the Federal Employees' Compensation Act which is the exclusive remedy to which the District of Columbia employee is entitled. A second distinction is the fact that the employees in the Weaver case were actually working in the automobile; Mr. Weaver was actually operating a walkie talkie radio in the rear seat. In our case the individuals involved were on the way to a teacher's meeting and were not engaged in any governmental activity at the time of the collision complained of.

The Statute in question, which is in derogation of the common law should be strictly construed and should not be used as a vehicle to deprive Mrs. Davis of her action against Mr. and Mrs. Harrod for the severe and permanent personal injuries which she sustained.

WENDER & FINK

By /s/ Jules Fink

Attorney for Plaintiff

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[Filed April 10, 1968]

ORDER

Upon consideration of the Motion of the defendants for summary judgment, the Points and Authorities as filed in support of said Motion, the Opposition as filed to said Motion, and, after argument in open Court, it is by the Court this 10th day of April, 1968,

ORDERED that the Motion be and the same is hereby granted and judgment be entered in favor of the defendants herein.

/s/ Edward M. Curran

JUDGE

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[Filed May 3, 1968]

NOTICE OF APPEAL

Notice is hereby given this 3rd day of May, 1968, that the Plaintiffs, Felicia Page Davis and Glenn W. Davis, hereby appeal to the United States Court of Appeals for the District of Columbia from the Order of this Court entered on the 10th day of April, 1968, granting Summary Judgment to the Defendants herein.

/s/ Jules Fink

Attorney for Plaintiffs

* * *

[Certificate of Service]

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IN THE

# UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,990

FELICIA PAGE DAVIS,

*Appellant,*

v.

PHYLLIS O. HARROD
and
DENNETTE HARROD,

*Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

## BRIEF FOR APPELLEES



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# INDEX

Page

COUNTERSTATEMENT OF THE CASE ..... 1

ARGUMENT ..... 3

CONCLUSION ..... 9

## TABLE OF CASES

Aubrey v. United States, 103 U.S. App. D.C. 65, 254 F.2d 768 .....6, 7, 9

Beechwood v. United States, 264 F. Supp. 927 ..... 5

Daniels-Lumley v. United States, 113 U.S. App. D.C. 162, 306 F.2d 769 ..... 7

Lewis v. United States, 89 U.S. App. D.C. 21, 190 F.2d 22 ..... 5

United States v. Julia Lee Charles, No. 21,213 (decided May 28, 1968) ..... 7

Weaver v. Irani and Milam, 222 A.2d 846 ..... 3, 4

## STATUTES

75 Stat. 519, Sections 1-921 - 1-926, D.C. Code, 1967 Ed. ..... 3

5 U.S.C. 751, et seq. ..... 2

Title 8, Section 2679, U.S. Code ..... 4

33 U.S.C.A. § 901 et seq., Title 36-501, D.C. Code, 1967 Ed. ..... 8

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APPEAL FROM THE UNITED STATES DISTRICT COURT
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## BRIEF FOR APPELLEES

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## COUNTERSTATEMENT OF THE CASE

Appellees agree in the main with the facts as have been set forth by appellant in her Statement of the Case, but do, however, feel that a fuller statement of the case would be of assistance to the Court.

The Complaint (J.A. 2-4) sought monetary damages by appellant, Felicia Page Davis, for personal injuries allegedly received by her in a

motor vehicle accident that occurred on February 25, 1965, when she was a passenger in an automobile operated by appellee, Phyllis O. Harrod, which vehicle had been forced off of the paved roadway and into a light pole by an unidentified truck, which latter vehicle had ignored an official stop sign.

The male plaintiff, Glenn W. Davis, although not married to Felicia Page Davis until some five months subsequent to the accident of February 25, 1965, sought damages for loss of consortium, conjugal fellowship and services.

Upon motion of the appellees, Count II of the Complaint, the consortium claim of Glenn W. Davis, was dismissed by the court below. No appeal was taken from that order of the court.

In the course of the pretrial discovery proceedings instituted by counsel for appellees, it was affirmatively established that, at the time of the accident of February 25, 1965, both Mrs. Davis and Mrs. Harrod were engaged in their respective duties as counselors for the District of Columbia School Board, and while within the scope of their employment with that agency, were en route to a meeting of District of Columbia high school counselors at Spingarn High School.

Both ladies apparently sustained bodily injury in the accident, which injuries required hospitalization, medical care and treatment. Both also missed time from their employment by reason of these injuries. Fortunately, however, since both of these ladies were actively engaged in their duties as employees of the District of Columbia Government at the time of the accident, both were entitled to, applied for and received payment of their physicians' statements, hospital bills and all other benefits rightfully due them under the provisions of the Federal Employees Compensation Act, 5 U.S.C. 751, *et seq.*, the workmen's compensation law for injured District of Columbia employees. 5 U.S.C. 794.

When the above information regarding the status of appellant, Felicia Page Davis, and appellee, Phyllis O. Harrod, as employees of the District of Columbia Government at the time of the accident of February 25, 1965, became known, a motion for summary judgment was filed by appellees, Harrod, based on the provisions of 75 Stat. 519, Sections 1-921 - 1-926, D.C. Code, 1967 Ed., known as the District of Columbia Employees Non-Liability Act.

Opposition was filed to appellees' motion for summary judgment and after oral argument, summary judgment was granted in favor of appellees. This appeal followed.

## ARGUMENT

The provisions of the involved District of Columbia statute are clear and mandatory. There is no ambiguity, mystery, confusion or obscurity in the language of this statute. A District of Columbia employee is guaranteed personal immunity from suit for personal injury from anyone resulting from the operation by such employee of any vehicle, if ". . . the employee was acting within the scope of his office or employment." D.C. Code, Sections 1-921 - 1-926, 1967 Ed.

The case of *Weaver v. Irani and Milam*, 222 A.2d 846, cited in appellees' motion and relied upon in this Court, is exactly in point, both in fact and in law. In that case, appellee Milam was a Metropolitan Police officer operating his own automobile on assignment as a member of the Canine Corps. Appellant Weaver, the injured claimant, also a member of the Canine Corps and on duty as such at the time of the accident, was riding in the right rear seat of the Milam vehicle and operating a "walkie-talkie" radio in the performance of his duties as a Metropolitan Police officer when the vehicle was involved in an accident with another automobile, owned and operated

by appellee Irani. The District of Columbia Court of Appeals affirmed the action of the trial judge in ruling that appellee Milam was immune from the suit of his co-employee and fellow Metropolitan Police officer, Weaver. There is absolutely no distinction, either in law or in fact, between the situation existing in the present case and that as presented to the Court in *Weaver*. In each case, the host-driver and guest-passenger were employees of the District of Columbia Government. In each case, the injured passenger filed suit against the host-driver. There is no reason presented to this Court in this instant case why the decision of this Court should differ in any way from that of the District of Columbia Court of Appeals in its ruling that the involved statute bars the suit for personal injury against a District of Columbia employee resulting from the operation by such employee of any vehicle, if such operation was within the scope of his office or employment.

It is conceded that appellant-plaintiff Davis received all the benefits due her under the provisions of the Federal Employees Compensation Act, the workmen's compensation law for employees of the District of Columbia. Although counsel for appellant pays lip service to the provisions of the Federal Employees Compensation Act insofar as counsel admits that said Act designates its benefits as the "exclusive" liability of the United States and its instrumentalities, appellant's counsel then argues, and erroneously, that by reason of the subrogation provisions of the Federal Employees Compensation Act, appellee, Phyllis O. Harrod, would be considered a "third party," and as such, under common law, Mrs. Davis could sue Mrs. Harrod. This argument is clearly fallacious. Appellant disregards entirely the provisions of Title 8, Section 2679, U.S. Code, which provides for the insulation of a Federal employee from personal liability for another's injuries arising out of the Federal employee's employment by the United States and while driving his own automobile in the course of his employment with the United States; and, generally, that the remedy

of any person injured as a result of the operation of a motor vehicle by a Government employee while acting within the scope of his governmental employment is exclusively against the United States, and not against the employee, whether the vehicle was owned by the United States or by the employee.

Exactly the same situation as presented by appellant's argument was presented in the case of *Beechwood v. United States,* 264 F. Supp. 927. George Beechwood was a postal employee who was injured when struck by a motor vehicle owned and operated by one Selma Meathrel, also an employee of the United States, while acting within the scope of her employment at the time of the accident. Suit was filed by Beechwood against Meathrel in the Montana state court. However, upon motion of the United States, the action was removed to the appropriate District Court, and the United States was substituted as a defendant. A motion to dismiss the action for failure to state a claim was then filed by the United States. In granting this motion, the Court stated:

> "The plaintiff's remedy against the United States is limited to recovery under the Federal Employees' Compensation Act and the United States' motion for summary judgment should therefore be granted. The case is dismissed and not remanded because plaintiff has no remedy against Selma Meathrel. Section 2679 (b), Title 28 U.S.C. insulates a federal employee from liability for injuries to another arising out of motor vehicle accidents happening in the course of federal employment. The case is dismissed."

In the District of Columbia there have been many decisions of this Court interpreting those sections of the Federal Employees Compensation Act dealing with the exclusiveness of this Act as applied to the remedies available to injured federal employees. The case of *Lewis v. United States,* 89 U.S. App. D.C. 21, 190 F.2d 22,

involved injuries sustained by a member of the United States Park Police. This decision was followed by the case of *Aubrey v. United States*, 103 U.S. App. D.C. 65, 254 F.2d 768, a suit under the Tort Claims Act brought by a civilian employee of the Officers' Mess at the Naval Gun Factory, Washington, D. C. In this latter decision, this Court reviewed other cases involving this same point, and in its decision concluded:

> "In Feres v. United States, 1950, 340 U.S. 135, 71 S. Ct. 153, 95 L. Ed. 152, the Supreme Court considered the question whether a plaintiff injured while on duty with the armed forces through alleged negligence of the United States could sue under the Tort Claims Act. The court noted that Congress had provided systems of simple, certain, and uniform compensation for injuries or death of those in the armed services, and construed the Tort Claims Act to fit into the entire statutory scheme of remedies against the Government to make a workable, consistent and equitable whole. It held that in view of the compensation system provided, it was not the intent of Congress to allow a serviceman to sue the United States for injuries incident to his duties in the armed forces, although the Tort Claims Act did not expressly withhold his right to sue the United States.
>
> "The Supreme Court in Johansen v. United States, 1952, 343 U.S. 427, 72 S. Ct. 849, 96 L. Ed. 1051, applied the same principle in affirming the dismissal of a suit against the United States by a civilian seaman for damages for injuries incurred in his employment aboard a public vessel and caused by the alleged negligence of the United States. The court held that since the seaman was protected by the Federal Employees Compensation Act, 5 U.S.C.A. § 751 et seq., he could not bring suit against the United States under the Public Vessels Act, 46 U.S.C.A. § 781 et seq.

> even though again the Compensation Act did not in terms state that it was the exclusive remedy available against the United States for such injuries.
>
> "We conclude that Aubrey is precluded from maintaining this suit under the Tort Claims Act by the principle set forth in Feres and Johansen that the Act was not intended to grant the right to sue the Government to one who has been provided another remedy against its own instrumentality by the Government through a system 'of simple, certain, and uniform compensation for injuries or death.' The compensation system provided for plaintiff Aubrey must, like the Tort Claims Act, 'be construed to fit, so far as will comport with its words, into the entire statutory system of remedies against the Government, to make a workable, consistent and equitable whole.' See also Lewis v. United States, 1951, 89 U.S. App. D.C. 21, 190 F.2d 22; Sigmon v. United States, D.C.W.D. Va. 1953, 110 F. Supp. 906. We do not think the fact that the insurer is not the United States but a private insurance carrier requires a distinction between this case and Feres or Johansen."

Following *Aubrey* are found other decisions of this Court enunciating the same principles. See *Daniels-Lumley v. United States,* 113 U.S. App. D.C. 162, 306 F.2d 769, and *United States v. Julia Lee Charles,* No. 21,213 (decided May 28, 1968).

The above arguments and cited cases demonstrate conclusively that as either a District of Columbia employee, or as an employee of the Federal Government, appellant, Mrs. Davis, has been granted and has accepted all of the benefits rightfully and exclusively hers under the provisions of the Federal Employees Compensation Act.

Nor would the ultimate result be otherwise if, at the time of the accident giving rise to this litigation, Mrs. Davis and Mrs. Harrod,

instead of being employed by the District of Columbia Government, were employed in private industry and thus were subject to the provisions of the District of Columbia Compensation Law, the Longshoremen and Harbor Worker's Compensation Act, 33 U.S.C.A. § 901, *et seq.*, Title 36, § 501 D.C. Code, 1967:

> "(a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer *or a person or persons in his employ* is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person" (emphasis supplied).
>
> "(i) The right to compensation or benefits under this chapter shall be the exclusive remedy to an employee when he is injured, or to his eligible survivors or legal representatives if he is killed, *by the negligence or wrong of any other person or persons in the same employ;* Provided, That this provision shall not affect the liability of a person other than an officer or employee of the employer. As amended Aug. 18, 1959, Pub. L. 86-171, 73 Stat. 391" (emphasis supplied).

As can be seen from the above quoted provisions, this compensation law for all non-government employees and employers of the District of Columbia specifically precludes a suit by an employee against his or her employer and/or a fellow employee.

Appellant Davis has not been deprived of any of her basic rights, claims or causes of action due her under any theory of law. As a District of Columbia employee, she is subject to all of the laws, rules and regulations that must govern such employees, and these employees' relationship to their employer.

Her position is not unique; she stands as does every other employee who is injured during the course of his or her employment. If, as in this instance, she claims her injuries were caused by the negligence of a fellow employee, her exclusive remedy is workmen's compensation. As was so aptly phrased by this Court in the case of *Aubrey v. United States,* 103 U.S. App. D.C. 65, 254 F.2d 768, at page 69:

> ". . . the Act was not intended to grant the right to sue the Government to one who has been provided another remedy against its own instrumentality by the Government through a system 'of simple, certain, and uniform compensation for injuries or death.' The compensation system provided for plaintiff Aubrey must, like the Tort Claims Act, 'be construed to fit, so far as will comport with its words, into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole.'"

## CONCLUSION

The granting of summary judgment by the District Court was eminently correct. The judgment should be affirmed.

Respectfully submitted,

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